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No. 80-951

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Petitioner,

v.

TRANS WORLD AIRLINES, INC.,
Respondent,

and

ANNE B. ZIPES, PATRICIA A. SANTINI, and PAMELA J. DAILING, individually and on behalf of a class,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, AS AMICUS CURIAE

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO, respectfully moves this Court for leave to file the accompanying brief as *amicus curiae* in support of the position of the petitioner Independent Federation of Flight Attendants.

INTEREST OF THE AMICUS CURIAE AND ISSUES TO BE COVERED IN THE BRIEF AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 104 national and international labor organizations representing approximately 14,750,000 employees throughout the United States.

In this case brought under Title VII of the Civil Rights Act of 1964, the courts below overrode a collective agreement without a determination that the agreement conflicts with a right or remedy established by any federal substantive statute. It is our position that such judicial action contravenes the national labor policy and is not authorized by Title VII. In the accompanying brief *amicus curiae* we canvass the relevant statutory materials and decisions of this Court and demonstrate the correctness of that position.

CONCLUSION

For the above-stated reasons, this motion for leave to file brief *amicus curiae* should be granted.

Respectfully submitted,

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the *amicus curiae* in this case is set forth in that motion.

ARGUMENT

The Union and the Company in this case entered into a collective agreement that, *inter alia*, establishes the seniority rules by which employees covered by the agreement compete for scarce job opportunities. Subsequently, on the basis of a settlement agreement between the Company and the plaintiffs, and over the objection of the Union which was a party in the litigation, the district court ordered that the provisions of the collective agreement that define the employees' relative seniority standing [1] are to be overridden as follows:

> [E]ach class member who is now employed as a TWA flight attendant or will hereafter become employed as a flight attendant by TWA under the Settlement Agreement shall be credited with the amount of union * * * seniority to which she was entitled on the date on which her employment was terminated, plus credit for such seniority for the "compensation period," as defined in the Settlement Agreement * * *, less the deductions provided therein * * *, the terms of which are incorporated by reference and are adopted as part of this Order. [Pet. App. 19a].

To make all the more clear that this order would override the collective agreement, the settlement agreement, which the district court adopted and retained jurisdiction to enforce (Pet. App. 17a), specified (Pet. App. 36a-37a):

> Nothing contained in any other agreement or writing and no right or obligation which has arisen or accrued outside of this Settlement Agreement (including prior, current and future labor agreements) shall be deemed to modify, change or diminish the rights and obligations which arise under this Agreement.

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[1] See, *e.g.*, Joint Appendix Vol. II at 90-101.

The order of the district court, which was affirmed by the court of appeals, was not premised on a finding that the collectively bargained seniority provisions are illegal, nor on any finding of a violation of law. Indeed, the settlement agreement recited: "TWA expressely disclaims any liability in these lawsuits and states that it is entering into this Agreement to avoid expenses, inconvenience and the distraction of burdensome and protracted litigation" (Pet. App. 25a); and, at the time the district court entered its order, the court of appeals had already ruled that the claims of the vast majority of those who would secure this extra-contractual seniority credit were time-barred (Pet. App. 40a-58a). The sole predicate for the order was the settlement agreement between the plaintiffs and the Company, to which the Union objected.

In any area of the law, there would be reason to doubt the correctness of the following judicial actions: first, the grant by a trial judge of final relief against a party (here the Union) without that party's consent and without first resolving whether the plaintiff is entitled to that relief as a matter of law or of fact; second, a trial judge's disposing of a suit brought by A against B, concerning a subject also covered in a contract between B and C, by adopting and enforcing a settlement agreement between A and B which denies C the fruits of his bargain without a determination by the judge that the law requires the contract to give way.

The proposition that in such a situation the courts may sanction settlements by which the defendant B transfers C's rights to the plaintiff A contravenes intuitive conceptions of the just and proper functioning of the judicial system. Thus, even putting questions of due process to the side, that untoward result should be indulged only if there is the most compelling evidence that Congress so intended. There is no such evidence here.

Moreover, because in this instance the contract being overridden is a collective agreement, the core premises of the national labor policy independently require that the result reached by the courts below be set aside As we show below, the national labor policy is founded on a system of free collective bargaining in which an employer and the exclusive representative selected by its employees order their relationship without government dictation as to the terms and conditions of employment that emerge from that bargaining. That system precludes negotiation between the employer and factions of employees as to terms and conditions of employment. And, to further the national interest in industrial peace and stability, Congress made it a matter of paramount federal interest that the result of that system, the collective agreement, be enforced as written. A court may enter an order overriding a collective agreement only upon a finding that the agreement conflicts with a right or remedy established by a federal substantive statute, or where both parties to the agreement, by consenting to the entry of the order, have effectively amended the agreement themselves. Neither of those requisites is satisfied here.

1. Three facets of the national labor policy are implicated by the action of the courts below.[2]

First, "[t]he ordering and adjusting of competing interests through a process of free and voluntary collective

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[2] In all respects relevant to the discussion that follows the two basic federal labor relations statutes—the Railway Labor Act (RLA) and the National Labor Relations Act (NLRA) as amended by the Labor Management Relations Act (LMRA)—are perfectly congruent. In developing each of the three basic propositions we make regarding national labor policy, we therefore cite decisions interpreting both the RLA and the NLRA. Although this case involves the RLA, most of the decisions we discuss involve the NLRA, because the NLRA has more often provided the occasions for this Court's articulation of the national labor policy.

bargaining is the keystone of the federal scheme to provide industrial peace." *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 104. The "fundamental premise" of that process, as Congress and this Court have made clear, is "private bargaining under governmental supervision of the procedures, without any official compulsion over the actual terms of the contract." *Porter Co. v. NLRB*, 397 U.S. 99, 108. "And to make crystal clear the intention to leave the parties entirely free of any Government compulsion to agree to a proposal, or even reach an agreement, Congress added § 8(d) [to the NLRA] defining 'to bargain collectively' as 'not [to] compel either party to agree to a proposal or require the making of a concession.'" *Carbon Fuel Co. v. Mine Workers*, 444 U.S. 212, 219. See also to the same effect *Locomotive Engineers v. B. & O. R. Co.*, 372 U.S. 284, 289-290.

Second, where, as here, the employees have chosen an exclusive bargaining representative, the national labor policy prohibits the employer from bargaining with any individual or any faction of employees with respect to wages, hours, and terms and conditions of employment. As this Court explained in *Medo Corp v. Labor Board*, 321 U.S. 678, 683-684:

> The National Labor Relations Act makes it the duty of the employer to bargain collectively with the chosen representatives of his employees. The obligation being exclusive, see § 9(a) of the Act, * * * it exacts "the negative duty to treat with no other." *Labor Board v. Jones & Laughlin Corp.*, 301 U.S. 1, 44; * * *
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> * * * *
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> [I]t is a violation of the essential principles of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representative by negotiating with individual employees, whether a majority or a minority, with respect to

> wages, hours and working conditions. * * * *J. I. Case Co. v. Labor Board*, 321 U.S. 332; * * *. [See also to the same effect *Virginian Ry Co. v. System Federation*, 300 U.S. 515, 548-549; *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342; and the Committee Reports on the National Labor Relations Act of 1935: S. Rep. No. 573, 74th Cong., 1st Sess., p. 13; H. Rep. No. 1147, 74th Cong., 1st Sess., p. 20.]

And, in *Emporium Capwell Co. v. Community Org.*, 420 U.S. 50, 69-70, this Court ruled that this prohibition on employer bargaining with employee factions has full application where the subject of the bargaining is how to deal with allegations of discrimination on the basis of race or sex:

> [T]he employees' substantive right to be free of racial [or sexual] discrimination * * * cannot be pursued at the expense of the orderly collective-bargaining process contemplated by the NLRA. The elimination of discrimination and its vestiges is an appropriate subject of bargaining, and an employer may have no objection to incorporating into a collective agreement the substance of his obligation not to discriminate in personnel decisions. * * * But that does not mean that an employer may not have strong and legitimate objections to bargaining on several fronts over the implementation of the right to be free of discrimination for some of the reasons set forth above. Similarly, while a union cannot lawfully bargain for the establishment of continuation of discriminatory practices, * * * it has a legitimate interest in preserving a united front on this as on other issues and in not seeing its strength dissipated and its stature denigrated by subgroups within the unit separately pursuing what they see as separate interests.
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> * * * *
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> The policy of industrial self-determination as expressed in § 7 [of the NLRA] does not require frag-

> mentation of the bargaining unit along racial or other lines in order to consist with the national labor policy against discrimination. And in the face of such fragmentation, whatever its effect on discriminatory practices, the bargaining process that the principle of exclusive representation is meant to lubricate could not endure unhampered.

Third, having established a system of labor relations built on the concept of free collective bargaining, Congress determined that:

> Statutory recognition of the collective agreement as a valid, binding and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace. [S. Rep. No. 105, 80th Cong., 1st Sess., p. 17.]

Thus, in § 301 of the LMRA, and in §§ 3 and 204 of the RLA, Congress established that neither party to a collective agreement may repudiate the commitments made therein and that enforcement of the private bargain as reached is a matter of paramount federal interest. As this Court stated in *Dowd Box Co. v. Courtney*, 368 U.S. 502, 509:

> The Labor Management Relations Act of 1947 represented a far-reaching and many-faceted legislative effort to promote the achievement of industrial peace through encouragement and refinement of the collective bargaining process. It was recognized from the outset that such an effort would be purposeless unless both parties to a collective bargaining agreement could have reasonable assurance that the contract they had negotiated would be honored. Section 301(a) reflects congressional recognition of the vital importance of assuring the enforceability of such agreements. [See also to the same effect *Machinists v. Central Airlines*, 372 U.S. 682, 689-695.]

"The present federal policy is to promote industrial stabilization through the collective bargaining agree-

ment." *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 578.

From the principles just reviewed,

> [i]t follows that the parties' agreement primarily determines their relationship. * * * If the parties' agreement specifically resolves a particular issue, the courts cannot substitute a different resolution. [*Carbon Fuel*, 444 U.S. at 219. See also *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249, 254-256.]

In this regard the national labor policy strictly limits the power of the courts. The judiciary has no authority to make collective agreements for the parties, nor to substitute agreements between the employer and factions of employees for the collective agreement, nor to remake the collective agreement the parties have made.

2. The system of free collective bargaining just described is, to be sure, limited by the body of federal statutes that directly prescribe certain substantive rules governing employers, employees, and unions. As the *Emporium Capwell* Court put it, "[w]hen union and employer are not responsive to their legal obligations, the bargain they have struck must yield *pro tanto* to the law. * * *" 420 U.S. at 70. "[N]either a collective bargaining contract nor a seniority system may be employed to violate [Title VII] * * *." *Trans World Airlines v. Hardison*, 432 U.S. 63, 79. But, as we have shown, unless a collective agreement is found to conflict with a right or remedy established by a federal substantive statute, that agreement must be enforced as written—a court may not vary the collective agreement's terms or sanction a contrary agreement between the employer and factions of employees.[3]

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[3] A collective agreement does not necessarily give way even when there is an apparent conflict with federal statutory law. Such conflicts are to be resolved in so far as possible by accommodation, worked out in the light of Congressional intent, between

It follows that unless there is a conflict between the collective agreement entered into here by the Company

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the national labor policy and the particular substantive rule. See *Connell Co. v. Plumbers & Steamfitters*, 421 U.S. 616, 622, 636:

> The Court has recognized * * * that a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions.
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> * * * *
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> In this area, the accommodation between federal labor and antitrust policy is delicate. Congress and this Court have carefully tailored the antitrust statutes to avoid conflict with the labor policy favoring lawful employee organization, not only by delineating exemptions from antitrust coverage but also by adjusting the scope of the antitrust remedies themselves. See *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940).

See also, *Mine Workers v. Pennington*, 381 U.S. 657, 665; *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 778; *Tilton v. Missouri Pacific R. Co.*, 376 U.S. 169; *cf., Barrentine v. Arkansas-Best Freight System*, —— U.S. ——, 49 L.W. 4347, 4349 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36.

Where the conflict is between a collective agreement and a state statute, this Court has ruled that the latter must give way. See *Teamsters v. Oliver*, 358 U.S. 283, 296:

> Federal law here created the duty upon the parties to bargain collectively; Congress has provided for a system of federal law applicable to the agreement the parties made in response to that duty, *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448; and federal law sets some outside limits (not contended to be exceeded here) on what their agreement may provide, see *Allen Bradley Co. v. Local Union*, 325 U.S. 797; cf. *United States v. Employing Plasterers Assn.*, 347 U.S. 186, 190. We believe that there is no room in this scheme for the application here of this state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions. Cf. *California v. Taylor*, 353 U.S. 553, 566-567. Since the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State. *Hill v. Florida*, 325 U.S. 538, 542-544. Cf. *International Union v. O'Brien*, 339 U.S. 454, 457; *Amalga-*

and the Union and Title VII of the Civil Rights Act of 1964, the courts below did not have the power they asserted to override that agreement in the absence of the consent of *both* contracting parties. But no such conflict has been shown to exist.

No violation of Title VII has been found by the lower courts. There is only plaintiffs' *allegation* of such a violation. In the settlement agreement, the Company "expressly disclaims any liability in these lawsuits * * *." Pet. App. 25a. And, the only court ruling on the validity of plaintiffs' allegation is the holding of the court of appeals that the Title VII claims of the vast majority of those in the plaintiff class—all of whom under the court order at issue would be granted extra-contractual seniority—are time-barred. Pet. App. 40a-58a.

Nor does Title VII authorize the courts to set aside collective agreements as inferior to settlement agreements between plaintiffs and employers. In *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79, this Court stated:

> Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts. Without a clear and express indication from Congress, we cannot agree * * * that an agreed-upon seniority system must give way * * *.

We have found, and the courts below have cited, nothing, much less "a clear and express indication," in the language or history of Title VII to suggest that Congress

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mated Assn. v. Wisconsin Employment Relations Board, 340 U.S. 383; *Plankinton Packing Co. v. Wisconsin Employment Relations Board*, 338 U.S. 953. The solution worked out by the parties was not one of a sort which Congress has indicated may be left to prohibition by the several States.

See also, *Connell Co.*, 421 U.S. at 637.

meant to empower the courts to override collective agreements on the basis of settlement agreements between plaintiffs and employers. Title VII in terms simply authorizes a court to provide a remedy "*if the court finds*" a violation of the statute. § 706(g) (emphasis added). That grant of remedial power includes the authority to provide extra-contractual seniority credits, such as those ordered here, on the finding of a violation. *Franks v. Bowman Transportation Co.*, 424 U.S. 747. Plainly § 706(g) is not a grant of authority to act in the absence of such a finding. To be sure, courts have unquestioned authority to issue orders providing such credits where *all* parties with an interest in the litigation, including *both* signatories to the collective agreement, agree to the entry of the order.[4]

But, against the background of the national labor policy, it does not follow that solely on the basis of settlement agreements between plaintiffs and employers, or plaintiffs and unions, courts may direct that collective agreements be overridden in the face of an objection from the other party to the collective agreement. This Court's decisions establish that under the national labor policy it is the collective agreement that takes precedence. And this Court has never reversed that order of priority where it is alleged *but not proved* that the collective agreement contravenes another federal statute. Congress cannot be assumed to have thought otherwise in enacting Title VII. And there is not a single word in the legislative history expressing such an understanding or manifesting an intent to subordinate collective agreements to settlement agreements. Indeed, a ma-

[4] At least in certain circumstances, Title VII permits the parties to collective agreements to modify seniority provisions, for example, to provide "rightful place" seniority relief to victims of discrimination whose claims under Title VII are time-barred. *Franks, supra*, 424 U.S. at 778-779; see also *Steelworkers v. Weber*, 443 U.S. 193.

jor theme stated in those legislative deliberations is Congress' intent to *minimize* the intrusion Title VII would work on free collective bargaining. As this Court pointed out in *California Brewers Assn. v. Bryant*, 444 U.S. 598, 608 (footnote omitted):

> Congress passed the Civil Rights Act of 1964 against the backdrop of this Nation's longstanding labor policy of leaving to the chosen representatives of employers and employees the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment. See generally *Steelworkers v. Weber*, 443 U.S. 193. It does not behoove a court to second-guess either that process or its products. *Porter Co. v. NLRB*, 397 U.S. 99.

In short, in enacting Title VII Congress did not go to the extreme of abandoning the core concepts of the national labor policy in order to allow employers and employees involved in a Title VII suit to end that case by agreeing to override a collective agreement despite the signatory union's objection. The courts below erred in directing that the collective agreement be overridden solely on the basis of an agreement between the Company and the plaintiffs.

3. In *Teamsters v. United States*, 431 U.S. 324, this Court gave implicit recognition to the analysis set forth above. In that case, the Court having held that the seniority system under challenge did not violate Title VII, there remained only claims of assignment discrimination against the employer. Under *Franks* those claims if proved could lead to relief providing extra-contractual seniority credits. Thus, with respect to those claims, the interests of the union in that case, as in the instant case, were implicated only to the extent that claimants who proved their case would be entitled to an award of retroactive seniority. In that context, the Court ruled (431 U.S. at 356, n. 43):

> The union will properly remain in this litigation as a defendant so that full relief may be awarded the victims of the employer's post-Act discrimination. Fed. Rule Civ. Proc. 19(a). See *EEOC v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1095 (CA 6).

At the page cited, *MacMillan Bloedel* states (footnote omitted):

> The Union was joined as a party defendant under Rule 19(a), Fed.R.Civ.P., "because the decree entered by the court may affect, in some way, its collective bargaining agreement" with MacMillan. The Union is not charged with a Title VII violation and no relief is sought against it.
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> We believe that the EEOC followed the proper course when it joined the Union under Rule 19(a), Fed.R.Civ.P. This provides the Union with a full opportunity to participate in the litigation and the formulation of proposed relief against MacMillan. • • • Such an opportunity will allow the Union to protect adequately the interests of its members, will provide the discriminatee with full and complete relief and will also insure that the suit is handled at one time and in one forum. This procedure is fully consistent with Title VII's emphasis on judicial expediency. See 42 U.S.C. § 2000e-5(f)(4) and (5).

According the union a "full opportunity to participate in the litigation" necessarily includes the opportunity to put the plaintiffs to their proof as a precondition to an order that would override the collective agreement. Otherwise, either the union would be deprived of an opportunity "to protect adequately" its contract right or the relief ordered by the court would be subject to collateral attack in an action by the union on the contract. In either event, one or more of the premises for joining the union as a Rule 19(a) party—to "allow the Union to

protect adequately the interests of its members, * * * provide the discriminatee with full and complete relief and * * * also insure that the suit is handled at one time and in one forum"—would be defeated.

4. Title VII evinces a Congressional preference for the voluntary resolution of claims of discrimination. The Act provides a means for the conciliation of disputes (see § 706(b)), and establishes a system of remedies designed to act as a "spur or catalyst which causes employers and unions * * * to endeavor to eliminate" discriminatory practices (*Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-418). The analysis to this point is perfectly consistent with those policies. Conciliation is a voluntary process, not a basis for court-ordered compulsion. And, while the courts' remedial powers are Congress' chosen means for enforcing compliance, the legislature did not grant the courts the authority to award remedies where *no* violation is proved. As a practical matter, that limitation hardly eliminates the incentive or the opportunity for self-correction.

An employer who believes that a provision of his collective agreement violates Title VII has the option of not honoring that provision. An unlawful contractual provision is not enforceable, and the employer response to a union § 301 action for breach of the agreement would be the defense of illegality. The union would prevail only if the agreement were found not to violate Title VII.

Alternatively, an employer who believes a contract provision unlawful could propose to the union that the provision be amended. If the union refused, the employer would be in a position to contend in any ensuing Title VII action brought by employees that if the contract is found unlawful, the union, by its resistance, "cause[d] the employer to discriminate," thus violating § 703(c)(3), and that the court should exercise its discretion to

apportion all of the backpay attributable to the unlawful contract against the union for the period following the union's refusal to amend the contract. See *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641, 655-656 (CA 5, 1974). In this manner, the "prophylactic" remedial objective of Title VII (*Albemarle Paper Co.*, 422 U.S. at 417) would be served: the potential for suffering the entire backpay responsibility acts as a "spur or catalyst" to induce self-correction on the part of the union (*id.*).

Where it is the union, rather than the employer, that believes a contractual provision unlawful, the latter but not the former of those two alternatives is available. *Johnson v. Ryder Truck Lines, Inc.*, 555 F.2d 1181, 1182 (CA 4, 1977), affirming 12 FEP Cases 895, 903, 904, 914 (WDNC 1975); *Terrell v. U.S. Pipe Foundry Co.*, 644 F.2d 1112, 1120-21 (CA 5, 1981). (As the union does not operate the plant, it does not have the capacity to effect a unilateral departure from the contractual terms. *Steelworkers v. Warrior & Gulf Corp.*, 363 U.S. 574, 583.)

The foregoing principles are equally applicable where, as here, the collective agreement is not unlawful *per se*, but rather is inconsistent with remedial relief that would be warranted if a Title VII violation occurred. If either party to the agreement believes that there were Title VII violations requiring such relief, the options described above would be available.

CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed.

Respectfully submitted,

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